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Good morning everyone, I am Brenda Lucas. I'm with the Office of Human Resources Management and the Strategic HR Planning and Accountability Division. Allen Hatcher is my supervisor. I am here this morning to introduce our speaker for the Whistle Blower Protection training. She comes to us from the Office of Special Counsel who has responsibility for enforcement and she will explain all of that to you, so, without further ado I will introduce Miss Shirine Moazed from the Office of Special Counsel. Thank you.

Thank you for that introduction, see I was hoping that people wouldn't sit all of them in the back. You pretty good, you are a little far back there for me. If you want to scoot forward you can. I'm going to try to keep it interesting. As Brenda said my name is Shirine Moazed and I work at the Office of Special Counsel. What we are going to be covering today are the 13 prohibited personnel practices under the Whistle Blower Protection Act and Enhancement Act. I understand that everyone here is a supervisor, is that correct? Yes.

Okay, so, why are the supervisors here? Well for a couple of reasons. One, we want to ensure that you have information on what these 13 prohibitions are, so, some of these types of prohibitions are a little bit technical. You need to know what they are so that you can avoid potential violations and even if you see something that is going on, perhaps it's a colleague or supervisor in a different division, that would be your opportunity to help educate as well. On the other side of the coin you have rights yourself, whether you are supervisors or staff, you have the right to file complaints under these 13 prohibitions as well.

We certainly at the Office of Special Counsel receive complaints from employees as diverse as a wage grade employee all the way up to an SES employee who feels that he or she has been retaliated against for whistle blowing. These are your rights and the rights of your staff. We think it's really important to set the tone at the top. If you are kind of open and receptive to your staff that may have either a whistle blower issue or some other hiring or promotion type issue, we found that that generally will help keep the allegation at the agency. Of course, they have the right to file at the Office of Special Counsel, but the more u are open and receptive to looking into issues generally employees feel encouraged and they may not take that additional step and file a complaint.

You know what I didn't check on, advancing the slides. Oh, you do that, okay, technical difficulty. Okay, let's go to the next slide. Here you see up on the screen the different authorities at the Office of Special Counsel, so, we don't just have authority over what we call the prohibited personnel practices most of you have probably heard whistle blower retaliation. We also have authority over the Hatch Act, which governs all of our political activity as well as a unit called the Disclosure Unit. This is the unit that can receive allegations of government wrong doing. It's what we call a safe channel for employees who are alleging that's a gross waste of funds at their agency.

That particular unit unlike the unit that I'm going to talk most about, the unit that handles the prohibited personnel practices, they don't have the authority to investigate. I'll talk to you a little bit about the process of a complaint because as a supervisor and as an employee I think it's important to understand how the Office of Special Counsel works. I've heard from time to time from different agencies that it's a mystery, the whole process is a mystery. Well, I don't want it to be a mystery so, feel free to ask questions about the process and then we'll get to the actual prohibitions.

We also have authority over the Uniform Services Employment and Re-employment Act but it's fairly limited. We used to have more authority under our pilot project, right now what happens is let's say you have a reservist who feels that he or she did not get a within grade increase while they were out on reserve duty, they have to file a complaint with the Vet Section of the Department of Labor within 60 days of that action. For a small percentage of those complaints, the vets can send us, the Office of Special

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Counsel, the allegation if they are unable to resolve it or if the employee, there complainant, would like the allegation litigated and there is sufficient evidence to prove that there is a violation.

Again, a more limited authority and those employees have to go through the Department of Labor. We go to the next slide. I know this is small print and if I were out in the audience I wouldn't be able to see this, so, this is the 13 prohibitions we are going to talk about today split up into four different categories. I'm going to spend the most time in two of the categories but let's talk about the categories first. The first category is discrimination. The second category is hiring and preferences. The third category is retaliation and then we have a couple of prohibitions that fall into what we call a catch all area.

Which two areas am I going to spend the most time in? I'm going to ask you all that. I'm going to spend the most time on the two areas where we've received the most complaints. Here is your opportunity to show me you've had enough coffee. How many of you think we've received the most complaints in the discrimination area? Show of hands. Got it, a couple of folks. Okay. How about hiring practices? Wow, that was the vast majority. What about retaliation? One, two, three, four, five, okay, I'm going to say -- I won't even go to the catch all because I can tell you it's not that category. You were really close, the actual number of complaints that we have received the most are the retaliation complaints.

Up until a few years ago you it used to be hiring practices but they are very close. I don't have the exact percentages but it's something like 52% of the complaints contain an allegation of retaliation and whatever the math is there, 48% contain those hiring preference allegations. Again we have kind of crossed over into retaliation as the most frequently filed complaint and some of that, to give you context for those of you, you probably have seen some articles in the paper mostly from about a year and a half to two years ago from the Department of Veterans Affairs employees. I don't know all the allegations, some of them had to do with manipulation of waiting lists for veterans, does that ring a bell?

It hit the papers a couple of years ago. Well, in general we get the most complaints from employees from the largest agencies. There is a one to one ratio. The largest agency in the government, Department of Defense agency but Department of Veterans Affairs is second. It used to be we got the most complaints from Department of Defense employees, well after the, what they call the scandal at the Department of Veterans Affairs it flipped. Right now we are still on an increase where we are getting the most complaints from Department of Veterans Affairs employees and you will see that cycle I'm sure it's not a cycle that you all ever want to be a part of but when an allegation gets that much press and repeated press, you are going to see an increase in complaints.

The way the Department of Veterans Affairs is structured where they have so many different medical centers and hospitals across the country, it can have sort of a cascade effect. Again something that I'm sure won't happen here. Those are the four categories and I'm going to try give you some examples for most of the prohibitions because you can read the definition and it doesn't really mean anything. The examples sometimes are long these cases, when we see facts, we see allegations from employees, most of the employees aren't lawyers, so you might get a 60-page narrative and we kind of have to distill it and figure out are they alleging nepotism? Are they alleging retaliation?

What is the basis of their complaint? Some of those complaints have a lot of facts included. We can go to the next slide. Before we get to the prohibition side I promised that I would talk to you a little bit about process again because I don't like process to be a mystery. Please if you have any questions at any time feel free to interrupt me. I know you are supposed to use a microphone though so that folks listening online can hear. The screen you see right now is our case numbers. At the Office of Special Counsel we only have jurisdiction with respect to prohibitive personnel practices over federal employees, not contract

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employees. We do have jurisdiction sometimes over former federal employees or applicants for federal employment.

There are certain agencies that we don't have jurisdiction over, those would be the intelligence agencies. One of the things we look at when we receive a case is do we have jurisdiction over the employee, over the agency? As you can see there has been a steady increase in our numbers, sort of a huge increase happening in the last few years and that has been driven by Department of Veterans Affairs. Here is where I make fun of myself as a lawyer, I was giving this presentation once and I said with all authority, "As you see our numbers have increased by 50%." Someone in the audience is like, "That is a 100%." Okay, there is a reason I went to law school, what we are doing is we are attempting to handle that increase in a couple of different ways, clearly we have not had 100% increase in our budget.

We've been very fortunate that we have had a little bit of an increase. We are trying to handle cases in a more expeditious manner. We're trying to settle cases early. Sometimes those cases will not have been investigated, so, different approaches to try to decrease our backlog. What we have is, we have I think this year we are up to 5,000 complaints. We have those 5,000 that come in and we have an office called the Complaints Examining Unit that does an initial review. We get that complaint, an employee alleges that there was an improper hiring process and the employee, the analyst, in our Complaint Examining Unit is going to review that allegation and determine whether it meets the basic elements of any of those prohibitions.

Again they are also looking at jurisdictions, do we have jurisdiction over the employee and the agency? Let's say that analyst makes the determination that that allegation meets that requirements of the prohibition, then what happens is for certain cases they may try to settle the case there in that intake office. For cases that might be more complex or long-term, they would, what we call refer the case for further investigation to the investigation and prosecution division. For all those cases that are referred for a full investigation those case are also reviewed to determine whether our ADR Unit, our Alternative Dispute Resolution Unit, might take a look at the case and offer to book the agency and the complainant, it's a voluntary process.

That was a lot about process, let me ask you a question. 5,000 or so complaints come in, how many of those complaints do you think a percentage, I'll give you some examples, are referred for a full investigation? Keeping in mind that the rest are closed or maybe settle very quickly. How many say 30% of cases are referred for a full investigation? Nobody? Higher, lower? Lower? No one. Okay, you guys are smart. 20%? 20%? 10%? We got some 10%, 5%? 10 percenters got it, about 10% of all the cases that come in are referred for a full investigation. I --

All the cases that come in are referred for full investigation, assigned to an attorney and an investigator to investigate the case. Determine whether there's evidence to support the violation and then potentially seek what we call collective action for the employee. Let's go to the next screen. What does that corrective action include? Now again these are for those cases where there's evidence to support the violation. You see the actual types of remedies that we can get for an employee on this screen. The damages are generally putting the employee back in the position they would have been had the violation not occurred.

Let me give you an example: someone alleges that they were suspended for 30 days for engaging in whistle blowing. You know I went to the press, I alleged that the agency had abused its authority in how it is handling a particular program and within 3 months my supervisor issued me a 30 day suspension. What's the remedy? Well the remedy is rescind the suspension, pay the employee back for that time period that they were suspended. If they were represented by an attorney they would have the right to

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attorney's fees and what happened at the end of 2012. Is congress and the president added a new type of damage and that is essentially damages for pain and suffering. Which had never been part of this statute before. Those are not always the most tangible damages but again, those were added for any actions that were taken after December 2012.

We also have the authority to seek disciplinary action against the supervisor or the official who committed the prohibited personnel practice. Let's say that supervisor who issued the suspension against the employee for whistle blowing, we would be able to seek discipline. Generally our cases 98% of the time they settle, we don't often litigate, where we would take a case if we were litigating is to the Merit Systems Protection Board. But the vast majority of our cases settle, so that means at the end of the case, assuming that there's evidence to support the violation the case attorney would call the agency counsel. Usually it's an attorney, sometimes it's not, present our case and ask the agency to take appropriate corrective and/or disciplinary action. A lot of times, again, the vast majority of time we are able to get corrective action and sometimes disciplinary action.

Before I move on from process we're going to start with that first category of prohibitions. Are there any questions? Okay, so we're starting those 13 prohibitions. You see the numbers up on the screen? Those actually relate to the legal citation and the statute, which is the US code title 5. The first type, that first category of allegation is discrimination and we have two different prohibitions that fall under that particular category and you can see them up on the screen. As you can see we have the same as, for instance the EEOC to review the kind of classic types of discrimination based on race, gender, age, et cetera. What you need to know is managers and employees yourself, for the most part we do not review those classic of discrimination allegations and the reason is because the EEO process exists already at your agency and there would be no reason to duplicate.

Also I didn't tell you all this, but we're an agency at around 130 employees, so we couldn't possibly be able to process all those discrimination complaints. Now that's our policy is written regulation and there are times where there's an egregious allegation of discrimination where we have accepted a case and one that I can think of several years ago was an allegation of discrimination based on sex and in this particular case the employee alleged that the manager inappropriately touched her and the agency refused to investigate. Because we have that unique authority to look at disciplinary action we did accept that case. What about, I don't know if you can see it, but two of those protected classes in that first bullet point are in slightly different font and that's discrimination based on marital status and political affiliation.

Have the right to file those types of complaints under your title 7 EEO rights, so we do accept those allegations. Let me give you a couple of examples, I had one employee long ago allege that her supervisor was treating her differently, discriminating against her because she didn't like her husband and the reason she said that the supervisor didn't like the husband was that. At office get together s, I guess they had more social events than we do at my agency, the husband would come and he was sort of loud and annoying. This is actually not intended to capture discrimination based on one particular person, it's just your status. Your status as a married individual or a married individual. If you're a supervisor and you decide that you want to do, maybe you have good motivation, you want to do something nice for the married folks in the office and you don't send them out on travel.

Only the single employees are sent out on travel, well that would fall under this prohibition, you know you don't want to have those types of policies that apply differently to married versus single folks. The other type of discrimination again, allegation that we review is discrimination based on political affiliation. I have an older case that I can talk to you a little bit about and see what you think about it. In this particular case, it was sort of unique because an agency was getting ready to bring a new employee on board, he was an SES employee. They hadn't actually hired him, he hadn't been put under oath but they had given him that

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verbal offer over the phone and the agency was really excited about hiring this individual so they did something unusual. They issued a press release in advance of actually hiring him, after the press release was issued they got some, I'll call them complaints, from one particular organization in particular who alleged that this individual was known to be very connected to one political party.

This particular agency, we're all politically neutral right? We're all nonpartisan, but this agency had some duties with respect to politics and it was very important to them to be perceived as absolutely neutral. The selecting official in this case had his assistant do a Google search, I'm not so sure we should all be doing Google searches, do a Google search on that particular person and guess what? Some of his political activity did come up, sometimes your political donations are public, other political activities came up. What the selecting official did was he withdrew the offer. Now when the office of special counsel investigated this case, the selecting official did not say, I withdrew the offer because this person was an ex-party individual. Right?

He said, look, we have this unique function, we have to be viewed as [politically neutral as possible and this was going to harm our mission. How many thought that the office of special counsel thought that was a good explanation and there wasn't a violation? Dang you guys, did I set that up too easily? No, we thought it was a problem, you can sometimes have motive that seems non-discriminatory. I'm sure that this particular selecting official could care less if this person belonged to X-party or a Y-party. But they rescinded that offer, politics should never weigh in to any decision that you're making because we are career employees. Right? The political s can make all those types of decisions when it comes to their schedule C folks but the rest of us are career employees and we're in a nonpartisan government where politics should not factor into any decision making.

What do you think the remedy was for this particular individual? Just shout it out if anyone knows. No one? Hire him? Well that would be the remedy under the law, this was before 2012 so there were no damages for pain and suffering. This was a small agency, this is a high level individual, this is probably not going to be shocking to some of you. He didn't want to job, he's not even hired and he's gone through this very difficult investigation and felt that he was not going to get a very fair shot at the agency. Now, if we take the case to the merit systems protection board that's all they can order. They can order the agency to hire him and to pay him for any back pay for that time period he wasn't hired. But as I mentioned, most of our cases settle and both the agency and the employee agreed to a fairly significant financial settlement.

If the employee had wanted to go back to the job of course the agency would be required to take him back. But you're going to find that that happens sometimes in these cases, especially whistle blower cases. They don't often want to go back to that very situation where they felt that they were retaliated against and so we work a lot with agencies to try to come up with settlements that serve both the needs of the agency as well as the complainant. The other type of discrimination that you see under bullet point 2 is, discrimination based on conduct which does not affect your work performance. What does that mean? I give that away, one of the examples, one of the types of allegations that we review is discrimination based on gender identity or sexual orientation.

Another example would be, what if you're a member of the NRA and your boss is very anti-NRA and you felt that your boss shifted your work schedule from the day shift to the night shift because he just didn't want to hear any more about the NRA and your views on gun rights. That could be viewed under this particular prohibition, so we need to be careful as managers and supervisors. Look, we all have our personal opinions and I'm not covering the [inaudible] here so I'm not talking about do you like Donald Trump or Hillary Clinton or none of the above. I'm talking about issues, right. People talk about issues in the office, it can sometimes bleed into your decision making and we're not always aware. This is one of

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those points where, as supervisors you have to have a little self-awareness of your own biases and just kind of check with yourself.

Hey, I just want to make sure I'm making this decision because it's a merit based decision. I'm not going to talk that much about the merit system principles because those aren't enforceable, those are the general guidelines for how we as managers treat our staff. But what's important to know is the prohibitive personal practices and the merit system principles work together because they're all to help us make decisions based on merit. Every one of these prohibitions has an element of non-merit. Sometimes it's a little hard to see but certainly in discrimination, again you want to make merit based decisions. I have one more example for you here, this is my only.

I promised you one semi-amusing story and then you're going to have to laugh because I'm going to tell it. I know it's morning time and one salacious story, I can't give you all the facts. But this was an unusual case and this is just to keep you awake. We had a case where an employee received a proposed suspension and one of the charges was that kind of general caveat, I'm sure you all have never seen this in a charge, conduct unbecoming. What was the conduct unbecoming? Civilian employee, the conduct unbecoming was for having an extramarital affair with a member of the military.

An extramarital affair with a member of the military. Let's just think about that. Whatever our morals or religious background, for civilian employees, there aren't rules on extramarital affairs, or there'd probably be a lot of employees in trouble. The agency would have had to connect that extramarital affair with some sort of job related issue, right? They can't discriminate against someone based on conduct not related to your work. I'm going to say an extramarital affair, unless you're having it at the office, is unrelated to work unless you can show a connection.

In this particular case, we asked the agency, "What's the connection? Did the employee fail to do her work? Was it so publicly known, and she worked with the military member, that there were allegations of bias or favoritism?" They weren't able to produce any of that evidence. Although, interestingly enough, they said, "Yeah, yeah, it was publicly known, so we knew the facts of the case." Way too many facts. We said, "How is it publicly known?" "It was publicly known when we started doing our investigation, we told people." We said, "That doesn't count, that would be after the fact."

I get it, this is a defense agency, and one of the push-backs was, "It's unfair. We have to treat the member of the military differently, this could be very severe." It ended up not being, for the member of the military, but they did have to take action, and she gets away scot-free. We had to do a lot of educating on the fact that different rules. One set of rules for the civilian employees and another set of rules for members of the military.

What was interesting, in that case, I had a male attorney assigned who was shocked when he asked the employee, I think he was expecting her to say that she hadn't had the affair, and she immediately said, "Oh, no, no, I did have an affair," and it ended up she was pregnant. It was like Peyton Place going on, and he kept saying to me, "[Sha-reen], do you have to assign me to this case?" The employee would say a little more information than he wanted to hear. I said, "You need to know enough to make sure whether we have a violation or not."

One of the aspects of this case was, there were two charges. The second charge had to do with her use of her private government phone. It was a fairly new capability that they could do texting, and they got some ridiculous amount of texts between her and the member of the military. I can't remember. I think they told me it was something like 1,000. It was over quite some period of time. They said, "Can't we just

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leave the suspension in, because she did in fact improperly use the phone?" The first thing we asked for was, "How have you treated other employees who have improperly used the phone?" We're always going to look at similarly situated employees. Just because someone has engaged in misconduct, you can still explore whether the penalty is appropriate or not. Unfortunately for us, and for the agency, they didn't have any information, because it was a new product, so they didn't have any misconduct charges out against anyone else for misuse of the phone.

What the agency did have, and we love emails, the Office of Special Counsel, when we investigate cases, what they did have was email exchanges where, when they first discovered the phone issue and then the affair, when the phone issue was discovered, the recommended discipline was a letter of reprimand. When they did not want to back down the suspension, we had to say, "You have to drop the extramarital affair because that's technically not going to be based on something you can charge someone, and before you knew about the affair, you were fine about a letter of reprimand." We somehow have to ensure that you're not increasing that penalty, that penalty is not disproportionately harsh because of conduct which does not affect work performance.

It was a difficult education case. I can tell you, we had to do some educating with the complainant, as well, because she pointed out to us that the member of the military was not in any way charged or disciplined for misuse of his phone. I had the same conversation with her. I said, "Look. Different rules for different types of employees, and we don't control how the agency handles the types of allegations against members of the military." I'll go to the next slide. Any questions? Okay.

I was asked to focus a little bit on the hiring offenses. Remember when we talked earlier, and I think a lot of you thought that we got the most complaints under these prohibitions? It's close. It's most under retaliation, but this is number two. We go back to the old Letterman top ten, this is number two. What I want to do is give you some examples under each of these prohibitions, with the caveat that all of these hiring offenses, and this should make you feel better, as supervisors, they all require intent. If you make a mistake, we all make mistakes. The vacancy announcement had the wrong experience level listed, or it was opened or closed for the wrong period. If it's just an error, that is not going to meet the elements of these prohibitions. These require intent. Intent to do what? Intent to favor one particular candidate inappropriately or harm another candidate. Intent to hire someone who's a relative. Again, think about, what is that requirement? It is certainly beyond making errors.

The first one I'm really going to cover, you see that first bullet point. It so rarely happens. This is intended to cover congressional recommendations that are not based on character or work experience. My quick example is, you get a letter from a congresswoman and it says, "I would like you to hire Constituent X. He is a wonderful person." You can tell it's a form letter, and that person has never worked for that congressperson, neither does that congressperson know them. This is sort of a hold-over from the old spoils system where people were feeling influenced by those in the higher levels, whether it's in Congress or even the political in your own agency, to hire someone just because it comes from, "Wow, that's a Congressional recommendation!"

The actual prohibition says you should not consider these types of recommendations. Of course, if the person actually worked with the congressman, or they were well-known, you can always give a character reference or a work-based reference. I had never seen an actual allegation. Here's my one, I'll make fun of myself. I had a vacancy announcement out at the Office of Special Counsel, and the mail room comes, and they offer me this letter, and sure enough, it was one of those form letters. I made a fool of myself, because it doesn't really say how you correct the violation, it just says, "You should not consider these improper references," so I walked around the office and I'm like, "I am ripping this up, and I am not considering it." Just make sure, sometimes you might get delivered that. Maybe someone in HR doesn't

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know that we shouldn't be reviewing those types of recommendations. Just something to put in the back of your head.

Let me go to nepotism. Here's my one amusing story. I'm going to force you to find it funny, because if you don't, look, I'm going to be embarrassed. I, like most attorneys, I always think, I'm going to date myself, my legal intern here is going to be like, "What? I've never seen that show." I always wanted my Perry Mason moment, and for those of you who aren't old enough, and I used to watch the repeats, Perry Mason would get a witness up on the stand, and through his amazing questioning, the person would break down and confess. Unfortunately, it doesn't really happen in real life, but I always wanted that moment.

I got this case alleging that a federal employee overseas had hired his stepson for a position. They did not send me overseas to investigate the case. I called up the official, this was a very complicated investigation, and through my scintillating questioning, I said, "Did you hire your stepson?" Right, these are not the most complex investigations, and he said, "Yes." We're not to the funny part yet. I thought to myself, "Aye yai yai," I said, "Why? Haven't you heard of the nepotism prohibition?" He said, "Well, his mother's a foreign national, and we married late in life, and I really can't stand the kid, and I was just trying to get him out of the house by giving him a job." The moral of the story is, even if you don't like your relative, you can't hire them. That's my only funny nepotism story.

These cases, generally, when they come to us, we see more complex variances. What about providing employee benefits? You're not the direct supervisor of your relative, but let's say, you set the telework schedule for various offices, including an office where your relative works. You should recuse yourself from that.

What about serving on a hiring panel? I've seen some supervisors who certainly know enough to recuse themselves from the actual panel where the panel is interviewing the relative, but they sit in on the other candidate interviews. Do you think that's a problem? Yeah, they shouldn't sit in on any of them. Clearly, you could start rating the other candidates very lowly to try to give your relative that unauthorized preference.

We had one agency where, at an HR office, we saw a lot of similar names, and it turned out, it was sort of a quid pro quo. Some of the folks there would say, "If you hire my kid, I'll hire your kid." Circumventing the nepotism statute is also going to be a problem. People sort of look at me strangely and are like, "Really? Does that happen?" It does. We had a case a couple of years ago where, he was like a third or fourth level supervisor, went to his wife's immediate supervisor, and instructed him to double her bonus. I'm sure that would never happen here, but just be aware that some people are still trying to either circumvent the law or take actions that they shouldn't under this particular prohibition.

The other prohibitions that we have listed, I'm going to give you a couple of quick examples under unauthorized employment preference, and then I'm going to give you a longer fact scenario and ask you which prohibitions up on this screen do you think have been violated. For unauthorized employment preference or advantage, what if an employee comes to you and asks you for help on drafting their application for an announcement? Is that an unauthorized preference? I got one yes, no? I think it could be a problem, and here's the issue. If you're doing that for one employee, then you should be doing that for all employees. It's that issue of what's being provided that could potentially give one person an advantage over others? As a supervisor, I would avoid that. I would certainly find whatever resources you have at the agency and suggest that they utilize those resources. We have seen some cases where a selecting official asks, and this is generally with internal promotions, asks for a resume from their

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preferred candidate and then wrote up the vacancy announcement using that resume. Clearly, that's an issue. We've seen that.

What about tailoring the vacancy announcement to better one particular candidate? Have you all ever seen that? We certainly have. These cases are circumstantial evidence cases, and oftentimes, unless one of you is coming forward to say, "Hey, I overheard this conversation," or, "I work in the HR office, and I saw this inappropriate email exchange," we may not have enough to actually send that case for investigation. We get a lot of complaints from employees who say, "There must have been an unauthorized employment preference because I clearly was the best candidate for the position, and they hired Joe." By itself, that's not going to be enough. We all think that we're really well-qualified.

That's not going to be enough, we all think that we're really well qualified. Sometimes they have a little bit more, you know the vacancy announcement, they'd always been held open two weeks and this particular vacancy announcement was only open for one week and the supervisor knew I was on vacation during that week. Again, circumstantial evidence going to be much harder to prove that they were trying to disadvantage that candidate but that's at least going to give us a little bit more to look at. We often get our better cases in this area from HR staff who come forward and say, I saw this going on, I saw this going on. I don't feel comfortable raising it to management, I always say that our HR staff are our first line of defense. Right, and they have to be empowered to be able to say and it's hard. Hey, you can't do that.

Here are these competitive rules, you might be dealing with a political appointee, you might be dealing with someone who's never been in the government before and really has no understanding of the competitive requirements. It's an education moment and yes, it can sometimes be difficult to have that conversation. But, and I think I was talking earlier about this, the earlier you have that conversation the less likely you're going to have a problem later on. What we've sometimes seen is that initial response to that new selected official which says, you have to follow XYZ rule. There's so many competitive rules I can't possibly go over all of them and then the official pushes back a little.

Well can't I pass over the veteran or can't I do XYZ and then the HR person sort of backs down. What I recommend, we have from time to time sought disciplinary action against HR staff that helped the supervisor circumvent the competitive procedures. It certainly has to be clear that they were aware that that was the intent, but I always try to empower HR staff and say, you need to do what you can do and that. It might be just an email saying I can't help you with this and have that individual work with that supervisor. Because if you're getting the push back and you're not comfortable and you just end up going along, that could be a problem for that individual. We have the general rules and the government obey and grieve, grieve and obey. But you're going to have to get your opinion out there that this is improper [inaudible] that this should occur.

Now if someone forces you to take an action or you're going to be fired, of course you need to take that action. But make sure it's well documented. Let me give you an example that may cover a couple of these prohibitions. We had a supervisor who had a vacancy announcement that was identical, it was in two different geographical locations. They were only about an hour apart and I'm going to throw some random facts out at you. After the supervisor issued the two vacancy announcements someone, not his supervisor, but someone higher in the chain of command than him, came by and said, my son-in-law is applying for that position, one of those positions that you have. That's my random fact, okay, so what happens with these vacancy announcements?

This was under the rule of three for veterans preference, now we have category, rating and ranking. Under that rule of three, a disabled veteran came up at the top of both lists. He applied for both jobs, wanted to make sure he got one of them and so the supervisor was obstructed from hiring anyone else.

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What did he do? According to the veteran who was out complainant, he called the disabled veteran into his office and he said, hey, you came up at the top of list A, aren't you interested in that job? The veteran said, yes but I'm really more interested in location B, how did I do there? The supervisor said, well I'm not sure but if you withdraw your application for location B I'll make sure you get that job in location A. What happens is, we got the case and investigated this case and the supervisor denied some of these facts. For instance, he denied that he asked the veteran to withdraw his application.

We didn't find his testimony credible, the day that they had the meeting and we have email confirmation that they had the meeting, the veteran withdrew his application. Generally people don't just withdraw on their own, they have some [inaudible]. He also denied that he knew that the veteran was at the top of both lists, we also didn't find him credible because we had documentation that showed that he got both lists with the veteran, the disabled veteran at the top of the list. What did we do with this case? First let me just ask you guys, ignoring the [inaudible] prohibition, the improper job references, we have 1-2-3-4-5 violations, potential violations. [inaudible] office of special counsel concluded that there were five violations.

No one, how about four, do I hear four? No, what about three? Two? We got a two. What about one? Okay, well we concluded that there were 1-2-3-4 violations and let me take you through it. First I'll tell you which one we didn't conclude, nepotism, that statement by itself. Remember the supervisor who was higher in the chain of command came by and said, hey, my son-in-laws applying. Their testimony was consistent, that statement by itself wasn't enough to show that he was, [inaudible] advocate for the employment of his relative. Now there could be additional facts, if we had found those facts that could have established that he was advocating for the employment but we didn't have enough there. Obstructing the right to compete, this one I kind of mislead you a little bit because I left off some of the definition. That's sort of the short hand but part of that prohibition talks about deception with respect to the right to compete.

When the supervisor failed to tell the veteran that he came up at the top of both lists, that was where we concluded he violated that prohibition. Influencing him to withdraw from competition, well that's pretty straightforward. Right? What about unauthorized employment preference? Again I left out a little bit of a fact here, so that was unfair. When the veteran withdrew from the location B guess what? The son-in-law came up to the top of the list and he was selected, so the unauthorized employment preference was really one in which it was harming the veteran and also favoring this other candidate. Had he not asked the veteran to withdraw from that particular vacancy announcement he would not have been able to hire the son-in-law of his friend and colleague at the agency. Last but not least, knowing the violating veterans preference. Yep, we have that, so what did we do in that case, this is an older case. As I mentioned, most of the time we seek settlement and for this case we were able to get the agency to offer the veteran that job and location B. But we also sought disciplinary action, I think at the time we were seeking 180 day suspension against the supervisor and it was an attorney on my team at the time who had the case and she had just left the agency after she finished the investigation.

I called up the agency counsel and I gave him my recommendation and he said, as all lawyers do, I'll get back to you on that. We eventually touched base again and he said, no, I'm not going to suspend this supervisor and I thought, okay. Well this is a case we'll litigate, that's our option. Right? We can litigate that case against the management official and I was preparing because again, we're a small agency, it's a lot of resources. He said, no we're actually, we've written up a proposed termination. What happened in that case was unbeknownst to the office of special counsel, we're conducting our investigation, that same supervisor was being investigated by the agencies office of inspector general. We sometimes find this with folks who are willing to ignore the law or circumvent the law, it's not just in one area, it's in many facets of their management supervision employment.

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That particular, these are just some facts that I like to throw out there. That particular employee was also being investigated for accepting, I like these, they're just so unique, free golf clubs. Apparently they were very expensive, I kind of butchered the name of the golf clubs, I don't remember them anymore. But all the golfers at my agency are like, oh yeah, those are nice clubs. Accepting free golf clubs from a contractor that has business with the agency and the he committed the ultimate violation. This would be the ultimate violation for OIG agents, he lied under oath. They put together the charges of the prohibitive personnel practices along with the charges of accepting those golf clubs and issued this particular official, a proposed termination.

I could probably give you some more examples under these hiring prohibitions. I also like to hear from you guys, have you ever had and I do not go back to the office of special counsel. I assume these are all hypothetical, have you had any situations come up where you thought to yourself. This might be, this might be a problem. Anyone want to share? Nope, okay. We're not in a sharing mood. Okay, what I would suggest if that does come up is use your agency resources. I don't if you're office of general counsel or you have other human resource specialists that can kind of help you figure out. Is this a problem, what should I do about it?

I hate for managers to feel like they're alone. We're in this together and I think we should use each other as resources when we can and sometimes these areas are a little bit tricky. Just talking about it, talking it out, trying to figure out. Maybe we should put a hold on this particular hire. Those are all fine outcomes, what you don't want to do is find yourself going along because that's the easiest thing to do. Sometimes we have to step up and say, this is a problem, they pay me the big bucks as the supervisor or manager and I've got to step in and do my job here. Now we're moving to the catch all prohibitions. The first one that you see up on the screen, I like to read this because, I don't know about you all. But when I started at the office of special counsel I thought, what in the world does that mean.

It prohibits taking or failing to take a personnel action that violates a merit system. I'm sorry, that violates a law, rule or regulation that concerns or implements a merit system principle. Wow, what does that mean? When we look at a couple of different types of allegations under this prohibition. One is what I would call more administrative violations. It's not that they're not violations but they're not going to be the type of violations where we would be seeking disciplinary action. Do you all have rules on how long someone can serve on a detail? Yes, okay. They're generally across the federal government. What if you keep someone on a detail for a year? That could violate this prohibition, so you're taking a personnel action, you put the person on a detail. That's a personnel action, in violation of the law will a regulation, will the regulation dictate how long that person can be on the detail.

How does it concern a merit system principle? Well again, these are very broad guidelines over how we can handle federal employees, one of them talks about fairness in recruiting and hiring. That part of the equation that you're almost always going to need, if you're making some sort of employment based decision it's probably going to concern or implement the merit system principle. In that type of case, we've gotten over the years. I had one agency tell me, no the person's not on a detail, this is two years. You're not on a detail they're just in an.

-- Details. This is like 2 years. They are not only detail they're just in an acting position. Even if you haven't documented it as a detail, if we're acting in another position that's pretty much the functional equivalent of a detail. We said, "Stop. The person needs to be removed from the detail." The idea behind those requirements really goes to fairness. If one person is serving in that position for a long time and eventually you have a position that's open, don't they have an unfair advantage over all the other employees who are unable to serve in that position? Again, it goes back to those Merit System Principles, fairness in hiring.

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Another type of provision that we look at here -- I always get a smile on my face because it's not my favorite thing to do. How many of you are responsible for yearly performance ratings of your staff? A bunch of you. No need to raise your hand here. What happens if you fail to issue a rating? I can tell you what happens at my agency. There's constant email reminders. You are approaching the 60-day date beyond the end of the performance rating period, you need to issue the rating.

Well, we have an agency -- I'll name the agency because it always amuses me. It was Department of Justice where a manager had failed to issue performance rating for 5 years. I'm not sure how that happen because again we're on kind of a reminder list. None of the staff complained. He put them in pro-bonuses and awards. He was a really well liked supervisor. There was a failure of communication between that manager and his supervisor, because it was his supervisor who filed the complaint. That should've been handled internally, right?

That technically is a violation. You have failed to take a personal action. You failed to issue the rating. It violates a regulation. It concerns a Merit System Principle. What is the remedy? Anyone? Yeah, we just tell people, "Issue the rating." You don't want the embarrassment of the Office of Special Counsel calling you up and saying, "Your employee filed a case and you need to issue a rating." In that particular case, we had to negotiate because Department of Justice pushed back. He had way too many subordinates, that was part of the problem. We eventually got them to issue 3 years of ratings to ensure that rep rights were protected.

One other type of probation, and then we're going to move quickly to the last under the same slide. Quickly to the last area which is retaliation, and spend our last 30 minutes there. One other type of allegation is, what about employees constitutional rights? As Federal employees, we have some limited rights that are not exactly the same as we have in our private life as civilians, but we still have constitutional rights. Let me give you the allegation. This one I can talk about because we issued a press release.

This is an older case. We had a professor with a Naval Academy who wrote a letter to the editor. He didn't use his title because sometimes there's issues with your title. He made it clear that this was his personal opinion. What he wrote was that he objected to the minority recruiting procedures who were members of the football team. This was hotly contested at the time. The paper published his letter to the editor.

The professor alleged that after that letter of the editor was published, he was not given -- It was essentially [wise] grade increase. These were not automatic. They were treated almost like bonuses at the Naval Academy for that year. The way it worked -- I learned something was the Naval Academy treats the increases like they would at a college rather the Federal Government.

All the professors at that particular department would sit around at a table and they would vote on each other's increases, not something I'm sure all of us would like, but that's how they handled it. The criteria was student evaluations publications, there's more at university type criteria for determining whether the professor should get his increase. All the professors voted and they voted yes. The dean, for the first time ever of that particular department vetoed the increase.

What I would like to say that the dean -- Remember going back to my [inaudible] confessed that the reason he did not issue the increases because the professor had written this letter to the editor. No, he did not say that. He said that he didn't believe that the professor met those 3 criteria. Investigation had to get the evidence to support or refute that. We did not find evidence to support the dean's explanation.

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There was also a letter. It wasn't even a promo letter of counseling, but essentially he issued the professor a letter stating, "You should not have revealed internal Naval Academy issues, procedures, to external parties." For our structure it's a motivation to retaliate, because there was nothing impermissible in his writing that letter to the editor.

For that particular case we settled, but that actually falls under the probation. Why? There was a failure to take a personal action with failure to issue that performance increase. Where was the violation of Naval or regulation? We said it's constitutional rights, his first amendment right to speech. One of the Merit Systems Principles talked about affording better employees their constitutional rights. That's how that all tied in.

The last [inaudible] provision we have. This is actually something new. The [13th probation] under the statute was added in December of 2012 with the passage of the Whistleblower Protection Enhancement Act. Essentially it says you cannot have a non-disclosure Agreement Policy or form that does not contain language informing employees of their whistleblower rights.

Do any of you all have stamped signed non-disclosure agreements?. What you do you need to make sure this information is in there. For non-disclosure agreements that are already on record, there's a way to them come into compliance without having employees re-sign. We have a memo up on our website that takes you through the steps. Another area to keep in mind is, if it's not just non-disclosure agreement, it's also non-disclosure policies. We're reviewing that at the Office of Special Counsel fairly broadly.

If you as a supervisor were to send out an email to your staff, you may not release any information you learn of while on the job. Hopefully, you won't have issued something not [inaudible] because there's a lot of stuff that employees can talk about that they learn about on their job. They can't reveal information that's prohibited by law, but there are plenty of things that are not prohibited by law. That type of non-disclosure, we'll cover that in non-disclosure policy, would have to have that Whistleblower Protection language. Essentially it's a way to say to the employee, "This might be my policy but you do have a right to engage in protected whistleblowing.

Any questions before we cover retaliation? We're in the home structure, I promise. Going to the next slide. I'm sorry, the one after that. Retaliation. We hear that word a lot. For purposes of the Whistleblower Protection Act, it has a specific meaning. It's not maybe as broad as some of you think. Maybe it's broader than others may think. There are 2 types of retaliation that are prohibited under the statute. That is retaliation for what we call whistle blowing , and because we always have to name things more than once, we use the term protected disclosures. It means the same thing as whistleblower.

If you hear me say protected disclosure, I'm also talking about whistle blowing. The second type of retaliation prohibited is retaliation for what we call engaging and protected activity. Before I define those 2 different -- We're going to define whistle blowing and we're going to define protected activity. I want to take you through the elements of the claims because they're the same. That happened after 2012. There used to be different standards, now they're the same.

If we go to the next slide, we see what we're calling the 4 elements of retaliation claim. First, someone has to have actually engaged in whistle blowing or protected activity. Second, there has to be a personal action taken or threatened or not taken. Third, there has to be actual or constructive knowledge. If I go to my next door neighbor and say, "Mark, my agency is now committing a violation of law," and then I am reassigned. Have I met the elements? I can whistle blow to my neighbor, but if my neighbor did not somehow let my agency know that I have engaged in whistle blowing, they're going to miss that knowledge element.

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The last element is did the whistle blowing or the protected activity, did it contribute to the personal action? Contribute is any factor. Even if you just sort of, "Well, in the back of my head, just really annoyed that that person keeps going to the OIG with these different issues. I think it needs to be in a different type of position. If it factors in it all into your personal action decision making, that needs contributing factor, that needs one of the last element of retaliation claim.

The reason I give you the elements first is I talk a lot about what is whistle blowing and what is protected activity? Even though I talk a lot about that, we'll get to that next, that's only one element. A lot of times supervisors play, "That's it?" The person they alleged xyz and that's it, they've won the case. No. Again, there are 4 elements we spend a lot of time on. Did they engage in whistle blowing or protected activity? That confuses supervisors and managers the most. They have to meet those other elements. Again, there has to be knowledge of personal action and contributing factor.

Going to the next slide, I promised you we will define whistle blowing in this slide. Of course, as I promised, we call it protective disclosures instead of whistle blowing. Whistle blowing has to fall into one of these categories. I can't whistle blow that I think having a conference room is a stupid idea. It has to be am I alleging a violation of regular regulation versus management.

[inaudible] abusive authority or substantial and specific danger to a public health or safety. Do employees file complaints and say, "I whistle blew and I'm substantial on specific danger go public health or safety?" No, because most employees, they're not lawyers, they give you factual scenario and then it's up to the Office of Special Counsel to figure out whether that meets one of those categories. Sometimes, we claim that it does and other times we find that it does not.

Let me give you one example that I'm going to come back to as we go through the elements. You're only getting here, again, the first element. Did this employee engage in protective whistle blowing? Here are the facts. We had an agent who worked in a really small field office. He alleged that his wife was -- He didn't allege, his wife was pregnant. He alleged that he went to his supervisor and he asked for Family Medical Leave Act to help after the birth of the child, the bonding period.

I'm sure all of you know this, but unlike other types of leave, that's a leave you're required to give. Whether it's an adoption, whether or not the individual have physical issues, it's a bonding period for birth of a child. The supervisor said -- I think he asked for the full 12 weeks, and the supervisor said, "I won't give you 12 weeks, but I'll give you 6 days."

We'll give you 12 weeks but I'll give you six days. The employee contacted the headquarters, sort of equivalent of the HR office and sort of relayed this story. Said here is what happened. My supervisor denied the leave and essentially aren't I entitled to that leave? That official said yes, your supervisor got it wrong. You got it right. Essentially that's what he did. He communicated the conversation that he had with the supervisor. How many of you think that that conversation with the HR official was protected whistle blowing? We did at the office of special counsel. I saw a few nods. Again, did that person say to us in their written, I am alleging that my supervisor violated a law [inaudible] regulation? No but the facts that he put together, the facts that he shared were my supervisor essentially violated the family medical leave act. The agency was also not convinced that that was protected whistle blowing but their issue was that ultimately, they did the right thing and gave the employee the 12 weeks of leave.

Well that's one issue and we were happy that the agency did that. With this particular employee alleged was that after he made that disclosure, a personnel action was taken against him. We will go more into what that personnel action is later. The fact that they corrected the underlying issue doesn't mean that he didn't engage in whistle blowing. We can move to the next slide. I have a bunch of examples. I am only

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going to hit one or two so we can finish up with the retaliation just to give you an idea of that difficult question. Did this employee engage in protected whistle blowing? I will go ahead and read it because it's pretty small up on the screen.

A therapist is given a government credit card and it told to only make purchases related to servicing her patients. Agency rules however only prohibit using the credit card for personal or unapproved purposes. Her supervisor later asks her to purchase groceries for a community fair run by the agency but not designed to help her patients. The therapist objects believing she is not allowed to make the purchases and that is her whistle blowing. How many of you think that it's protected? These are hard. I'm not holding anyone to any answer. We have a few yes. How many think it wasn't? A few no's. This one is close. Here, again I fail to give you some information. The standard for making these disclosures is that the employee has a reasonable belief that they are disclosing one of those categories of information. Built into that standard, it's a subjective and an objective standard is the possibility is that the employee gets it wrong. Right? Sometimes they are wrong but did they have a reason to believe?

This is an actual case that went to the board. It doesn't mean the employee prevailed on the case because their case was closed initially at the administrative judge level because that judge did not feel that the employee made a disclosure. The employee appealed to the full board and the board said even though the use, the use of that credit card, was not actually prohibited, a reasonable person could believe it violated agency rules because the therapist was told the card could only be used for limited purposes.

This is my advice to managers. Don't try to figure out whether one of your employees has engaged in whistle blowing. Right? Even by saying they are a whistle blower, they make that first settlement. You can be a perceived whistle blower. It's good to know that there are these categories because I think all of us need that information but it's not your job to figure it out or not. It's just your job to take legitimate personnel actions. Sometimes you are going to think to yourself, there is no way that that was protected whistle blowing. You might be right. Just put it out of your head. Right? Your job is to make sure you are taking actions based on legitimate either performance or conduct reasons.

Do you want one more example or should we go back to my agent? Go back to the agent? One more example? Which one? What? One more. Okay we will do one more. The second one I have. An employee makes a series of accusations against her supervisor which she believes generally amount to mismanagement. These include unfair quotas, a lack of objective performance standards, office efficiencies, here is my favorite, inefficiencies, rude comments by the supervisor. I know none of us would ever be rude and a failure to investigate a fake email account opened under a coworker's name. That's her whistle blowing. How many of you think it was protected or at least the Merit Systems Protection Board thought it was protected? Got a few nods. Anyone say no? Well the no's have it. What the Merit Systems Protection Board said is each of the employee's numerous disclosures only amounted to debatable management decisions or simple negligence which even if taken in the [inaudible] do not amount to gross mismanagement. Remember that category, unlike violation of law where regulation, it can be any regulation right? Minor or not. Management under our statute, under the protected disclosures, it requires gross mismanagement.

Okay so let's skip to slide 17. We spent a lot of time talking about what is whistle blowing. I think I gave you all advice to try not to figure it out. We have sometimes seen managers who appear to have motive to retaliate when they are doing their own sort of mini investigation into the employee's whistle blowing. Generally at most agencies, I would have the employee go to the office of inspector general or direct them to where your agency, they can make their allegation. Now clearly if it's something going on in your office and you need to address it then you would want to address it. If it's some larger greater abuse of authority allegation, you want to direct them to the appropriate authority and you as the manager, you

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probably shouldn't be investigating. Especially if it in any way implicates your management decisions. That was protected whistle blowing.

Protect activity is really kind of easy to meet. Remember you have retaliation for two types of activities. Whistle blowing and protected activity. What about if I file a grievance over my performance review? I have met element one. That's protected activity. Pretty straight forward going to the office of inspector general. Any right provided by law. Unlike whistle blowing, the employee is going to kind of have to jump through some hoops to show that they had a reasonable belief that they relieve information that fell into those categories. It's a little more straight forward for protected activity. Either you filed the grievance or you didn't. Either you went to the OIG or you didn't.

Moving to the next slide. We have just a couple of general reminders. A lot of times supervisors and employees think that they are only protected when it comes to whistle blowing if they make the disclosure to certain people. You can engage in protected whistle blowing to anyone. You have to be careful however, there are requirements if that whistle blowing violates a law then you can only make it probably to your office of inspector general or the office of special counsel. You certainly can't for instance go to the media with classified information or with privacy act information.

What about chain of command? We still see that one. It doesn't matter whether you are a defense agency or a non-defense agency, I think some supervisors just kind of have that terminology in their vocabulary and it's hard for them to let go of. Let me give you a hint. If the office of special counsel sees that language, you fail to follow the chain of command, and I'm going to use our favorite word for whistle blowing, when you complained to the HR office that you weren't provided that family medical leave act. We see that change of command language it almost automatically triggers a full investigation. We don't know whether the employee is going to win or not but it tends to show a motive. If you're trying to channel employees and say you can only go here, you can go only come to me or you have to follow this process, it kind of indicates some retaliatory motive.

Can move to the next slide. We talked a little bit about this. There is an exception. Whistle blower protection act does not apply if the employee violates the law when they are whistle blowing or if for instance the reveal classified information. There is a little caveat to that and that is they can come to the office of special counsel with that information. We have folks with top secret clearance that can come to the OIG, they can come to certain committees on the hill and reveal that information. Again they can't necessarily go to their friend or the media.

When we go to the next slide, there is kind of a definition of what does it mean to violate a law when you are whistle blowing? We had a supreme court case, it was our first whistle blowing supreme court case. The employee took it on its own. We wrote what's called a friend of the court brief supporting his case. The supreme court was looking at a very narrow issue going to that did the employee's whistle blowing violate the law. In this case it was a federal air marshal working for TSA and because it takes years to get to the supreme court this happened years ago. In that case the air marshal revealed first internally before he went to the media that the TSA was no longer permitting federal air marshals on overnight flights. He made it clear that in his view he thought that was in danger to public safety. This was that, I know we are back there again, but an increased time of airplane security issues.

What happens to him? He went anonymously to the media. His supervisors found out and they terminated him for revealing information that was prohibited by regulation. By regulation TSA said you can't reveal this information. It's prohibited sensitive security information. The supreme court looked carefully and again it got a little technical. Did that regulation come from a law? Was there something in the law that prevented Mr. McClain the employee from revealing this information? They looked at the law

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and they saw nothing. Essentially what they said to the agency is well you terminated this employee with no basis. You terminated him specifically for revealing this information to the media. It was not prohibited by law for him to reveal.

Just be careful that if you have an internal agency regulation that an employee has violated and they are engaging in whistle blowing. This is not, generally this won't come up. It has to be part and parcels of whistle blowing. You need to go to your general counsel's office or whoever provide you guidance to make sure that that regulation has similar language in the statute prohibiting the release of the information.

Okay so let's go to the next slide. We spent a lot of time on the first element which I told you we would. Which is did the employee engage in whistle blowing or protected activity? At the beginning I told you that's not the only element. The employee is going to have to show evidence of these three other elements. If we go to the next slide we define contributing factor a little bit more. There is a way for employees to meet contributing factor. Remember the actual whistle blowing or the protected activity has to contribute to your personnel action decision.

Back in the 80's not one employee prevailed in a whistle blower case at the Merit Systems Protection Board. They said to themselves, there might be something wrong with the law that we've written. What they did is they made it easier for employees to meet contributing factor. What they have to prove is if there is timing. They engaged in whistle blowing on January 1, 2015 and a year and a half later a personnel action was taken. As long as there was knowledge of the whistle blowing, the timing and the knowledge together is going to meet contributing factor. That timing tends to be limited to about a year and a half from the Merit Systems Protection Board but sometimes I've seen them spread that out a little bit longer.

There are other ways for an employee to show contributing factor and we have those listed. Sometimes agencies have inconsistent evidence regarding why they took the personnel action. Going back to our agent, the agent remember he made the disclosure about the family medical leave act. Well the personnel action in that case was a geographical reassignment. The employee alleged that I wasn't geographically reassigned for the reasons my supervisor gave. That was a prefect. It was really because of my whistle blowing. In that particular case it's the job of the office of special counsel to investigate and see does the agency have evidence to show that they were legitimately reassign that employee?

In that particular case the supervisor had written up a several page memo describing the different reasons for the reassignment. One of them was he was unhappy with the fact that the employee, he had carried a weapon, so he had to get re-certified at the shooting range every so often, I can't remember how often it is. He didn't like the shooting range the agent used. That seemed a little bit weak for a geographic reassignment. It wasn't something that he had previously shared with the agent. The second reason had to do with what the supervisor identified as a warrant-less search. Well that sounded really bad. When we looked at the facts, that warrant-less search had occurred over three years previous and that particular agent worked with an ASUA, assistant US attorney, who advised the agent that the search did not require a warrant. That seemed odd that you had to go back so far in time to come up with an explanation for your reassignment.

The last explanation had some merit. It talked about the agent's numbers. We were able to look at all the agents numbers and he was on the lower end. He wasn't the lowest but he was on the lower end. What do you all think? Was the agency, does that sound like a legitimate basis to geographically reassign someone? It sounded a little weak to us. You can different interpretations. You have to look at the evidence in each case but we got more information from the supervisor. The supervisor when he was

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interviewed, and I think I already gave this secret away. We don't call it whistle blowing. When we asked the supervisor who went through all of his reasons for geographically reassigning the employee and at the very end we said, you know did the fact that he complained about the family medical leave act, did that effect your decision at all? He said yes but just 1%.

Well I give him credit for honesty because you are going to have some sophisticated folks who have factored that in and who would never admit to it but he admitted to it. What happened in this particular case, he had a military background. His management style was very chain of command oriented and he talked about that. It really bothered him. He used these words, the agent went over his head to the HR office. That was sort of just ingrained in him this culture that you use a chain of command. Again for civilian employees, there is no chain of command when they are engaged in protected whistle blowing. I gave him, really I did give him credit for honesty because I have had other cases where I have been convinced it has factored in but the person does not acknowledge it.

If we look to the next slide those four elements. We talked a lot about them. Does an employee automatically prevail if they meet those four elements in a retaliation claim? No. The answer is up on the screen. The agency will still have the opportunity to prove by clear and convincing evidence that they would of taken the same action absent the whistle blowing or the protected activity. In the case that we just talked about, the agent, if those reasons were equally strong. Let's say he was very low on case numbers, he had difficulty that they were able to point out that it happened several times over the last year dealing with a particular case and he failed to show up to work in a timely manner.

If all of those reasons were supported by the evidence than the agency would be able to meet its burden. It's a higher burden than the employee's burden. The agency has to show by clear and convincing evidence it would of taken the same action absent the whistle blowing or the protected activity. The employee only needs to show by a preponderance of the evidence. If you want to look at that in sort of percentages, you can look at preponderance as over 50% of the evidence and clear and convincing as more like 75-80% of the evidence. You can see it's a higher standard for the agency to meet but nevertheless agencies do often meet that when they have a strong basis.

My closing advice to you all as managers is even for actions that you wouldn't normally feel like you have to document. For instance, a change in title could be a personnel action. Moving someone's office from a window office to a cubicle. That could be a personnel action. Hostile work environment if it rises to a high enough level, it could be a personnel action. Just make sure that when you are making those management decisions, even for more minor actions, because our definition, the statute's definition of personnel action is very broad. Much broader than adverse action. That you feel you've got sufficient documentation and evidence to support your action.

That might just be some emails to yourself. I have had supervisors over the years when they have had to explain a personnel action, why did you reassign this particular person and they will hand me like 100 pages and they will say it's all here. I documented it. I said well did you share it with the employee? No but I documented it. Part of documenting is sharing it with the employee and that's the hard part of being a supervisor. If you have emails where you show you met with the employee, you do a little follow up on I met the employee has failed to meet his or her performance standards and here's how, it can be simple, it can be short, it doesn't have to be fancy. That's going to help you be able to show that you are taking a legitimate personnel action and not one that's based on some type of protected activity.

All right. Did I finish in time? Any questions? Okay thank you all very much.

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Thank you. Thank you. Thank you very much. It's a privilege to hear someone with the breadth and depth of experience in dealing with these things. Is there anybody here who found any of this not helpful? Okay it's unanimous. [inaudible] It won't be whistle blowing. Thank you for coming and we are doing this again in June. June 8 and thank you for support. Thank you very much.